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IN THE

Supreme Court of the United States

October Term, 1964
No. 125

ROBERT B. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Reply of Petitioner Robert B. Roberts to the Supplemental Memorandum for the United States.

This reply to the Supplemental Memorandum for the United States is filed pursuant to the Court's request of November 22, 1965, in which Petitioner Robert B. Roberts was asked to file a reply, or replies, to the further response filed by the Solicitor General. The Solicitor General's further response was pursuant to the Court's request that he respond to the following questions:

1. What evidence in the record, if any, refutes the contention that any or all of the petitioners were convicted of one or more substantive offenses committed by co-conspirators before petitioners joined the conspiracy or after they severed their connections with the fraudulent enterprise; and

2. Assuming the record sustains the contention, what legal justification exists for such liability.

DISCUSSION.

I.

The Applicable Principles of Law.

Petitioner agrees with the Solicitor General's candid admission that a person cannot be convicted of a substantive offense committed by a co-conspirator before such person joined the conspiracy or after he severed his connection with the fraudulent enterprise. This is consistent with the Government's Brief filed in *Pinkerton v. United States,* 90 L. Ed 1489, 1493, 328 U.S. 640. The rule in *Bollenbach v. United States,* 90 L. Ed. 350, 354, 326 U.S. 607, 613, is in accord.

The Solicitor General's contention that Petitioner's "convictions on counts three, six and eight are fully supported by evidence of his participation in the conspiracy at the time these offenses were committed" (Page 7, Supplemental Memorandum for the United States) standing alone is offensive to the law. *Nye and Nissen v. United States,* 93 L. Ed. 919, 336 U.S. 613, and *Pinkerton* make it clear that unless the jury is properly instructed, membership is a conspiracy alone does not make a conspirator vicariously liable for substantive offenses committed by other co-conspirators. The jury was not so instructed in the case at bar.

The judgment against Petitioner can only be upheld if the proof adduced and the basis on which it is submitted to the jury were sufficient to support the verdict. It is only when the jury has been properly instructed as to the relevant standards to be applied to the case that a basis exists for determining whether the evidence is sufficient to support the verdict. Accordingly, the relevant question is not, was the evidence suf-

ficient, but rather was it sufficient to fulfill the required standards. *Nye and Nissen v. United States,* 93 L. Ed. 919, 926, 336 U.S. 613, 620, 69 S. Ct. 766.

It is not insignificant that Petitioner's conviction on counts one, two, four, five, seven and nine were set aside by the Court of Appeals on the sole ground that there was insufficient evidence of Petitioner's intent to participate in the execution of the scheme and the acts done in furtherance thereof, to warrant the submission of the charges to the jury. In affirming that the verdict of guilty on counts three, six and eight was supported, the Court of Appeals was eloquently silent as to the sufficiency of the proof adduced and the basis on which it was submitted to the jury.

Petitioner's liability for substantive offenses committed during the time he was allegedly connected with a conspiracy can be predicated upon three legal theories, and only three;

(1) Direct participation in the commission of the substantive offense. In the case at bar the trial court instructed the jury only on this theory [R. T. 4298]. *Pinkerton v. United States,* 90 L. Ed. 1489, 1497; 328 U.S. 640, 649. As stated in *Pereira v. United States,* 98 L. Ed. 435, 447; 347 U.S. 1, 14, 74 S.C. 358, "Concededly, Brading did not participate directly in the use of the mails to transport the thirty-five thousand dollar check from El Paso to Los Angeles. He can be convicted, if at all, only as an aider and abettor."

(2) Aiding and abetting another in committing an offense. 18 U.S.C. §2(a); *Pinkerton v. United States,* 90 L. Ed. 1489, 1497, 328 U.S. 640, 649. No instruction on aiding and abetting was given

in the case at bar. However, it is clear that a verdict on this theory requires submission of those fact issues to the jury. "The 'aiding and abetting' instruction entitled the jury to draw inferences supplying any lack of evidence directly connecting the petitioner Brading with the specific acts charged in the indictment from the abundant circumstantial evidence offered. The jury was properly charged on the theory." *Pereira v. United States,* 98 L. Ed. 435, 445, 347 U.S. 1, 10, 74 S.Ct. 358, *Nye and Nissen v. United States,* 93 L. Ed. 919, 925, 336 U.S. 613, 618, 69 S. Ct. 766. "We see therefore no reason to exculpate him as an aider or abettor. There was no inadequacy in the charge to the jury on that theory."

(3) Commission of a substantive offense by a co-conspirator in furtherance of the conspiracy and while the defendant was a party to the conspiracy. *Pinkerton v. United States,* 90 L. Ed. 1489, 328 U.S. 640. This instruction was not given in the case at bar. If the jury was not so instructed, the *Pinkerton* doctrine is inapplicable. As stated in *Pereira v. United States,* 98 L. Ed. 435, 445, 347 U.S. 1, "The Pinkerton case, however, is inapplicable here since the jury was not instructed in terms of that theory." Also, *Nye and Nissen v. United States,* 93 L. Ed. 919, 925, 336 U.S. 613, 618, holds that "A verdict on that theory [Pinkerton] requires submission of those fact issues to the jury."

The only theory submitted to the jury on the question of Petitioner's guilt on the substantive offense was that of a direct participant [R. T. 4298]. Therefore,

for those offenses, guilt is individual and personal, not vicarious. To convict on the substantive counts, Petitioner actually must have used the mails as part of the execution of the scheme to defraud and in furtherance of the plan or he must have known, or reasonably have been expected to know, that the mails would be used.

Pereira v. United States, 98 L. Ed. 435, 447, 347 U.S. 1, 13-14;

Parr v. United States, 4 L. Ed. 2d 1277, 363 U.S 370, 80 S. Ct. 1171.

As to counts three, six and eight, the record is barren of any evidence that Petitioner participated in a scheme to defraud which reasonably contemplated the use of the mails, and is equally barren of any evidence that Petitioner himself used the mails in furtherance of the plan. There is no evidence that Petitioner prepared or signed any document that was mailed or mailed any document or knew of any mailing or caused any mailing of any kind. *Pereira v. United States,* 98 L. Ed. 435, 447, 347 U.S. 1; *Parr v. United States,* 4 L. Ed. 2d 1277, 1290, 363 U.S. 370; *Williams v. United States,* 278 F. 2d 535, 537 (9th Circuit).

In the case at bar the Court gave this erroneous instruction: "He may not be in at the beginning of the conspiracy and yet if he enters the conspiracy, he is responsible for all of those who are in the conspiracy and everything that has gone before and for everything that goes on afterwards." [R. T. 4311]. "Now as I said in a conspiracy all the conspirators are responsible for everything that the other conspirators said or did, and those who . . . someone who is in a conspiracy he may not know who the conspirators are all of them. It is enough for him to know there is a conspiracy, and he is not

responsible . . . I mean he doesn't . . . may not know what they have done, but he is responsible for everything they do, both before and afterwards, so if your inquiry should determine whether there was two or more persons, and then if you find two or more persons did devise a scheme to defraud, then you will find that there was a conspiracy, and then the law of conspiracy would apply, so each one is responsible." [R. T. 4312-4313]. This was tantamount to a directed verdict of guilt on all counts and Defendants took exception to the instruction [R. 4339]. Manifestly that error alone caused such harm that the conviction cannot stand. To support a verdict of guilt, the evidence must establish a direct, individual and personal link between the conspirator and the offense charged. It is not a matter of mass application. In the mass trial of several alleged conspirators, the proceedings call for use of every safeguard to individualize each defendant. In such a case, extraordinary precaution is required not only that instructions shall not mislead but that they shall fully safeguard each defendant individually, as far as possible, from loss of identity in the mass. The jury instructions often become, in such cases, a defendant's principal protection against unwarranted imputation of guilt from another's conduct. *Kotteakos v. United States,* 90 L. Ed. 1557, 328 U.S. 750.

The case against Roberts is a far cry from one reeking with guilt. Guilt by association is a lurking danger in any conspiracy prosecution. Its consequences are more serious when a substantive crime is charged. Conviction of the guiltless bystander is, of course, the great danger when the conspiracy counts and substantive counts are tried together. The jury is subject to the temptation of genralizing and the attending confusion

makes this temptation hard to resist. At the very least, the court should instruct the jury that there is a difference between the real participation contemplated by a scheme to defraud and the more remote plotting embraced by a single conspiracy. This was not done here. *Nye and Nissen v. United States,* 93 L. Ed. 919, 930, 336 U.S. 613, 69 S. Ct. 766.

The question is not, was the jury right in its judgment regardless of the affect of the error upon the verdict. Rather, it is what affect the error had or reasonably may have had upon the jury's decision. The acid point is the impact of the error on the minds of the jury. It is what the error meant to them, not singled out and standing alone, but in relation to what else happened. The inquiry here cannot be merely whether there was enough to support the result, apart from the error. The linchpin is whether the error was sufficient to influence the jury. If so, or if one is left in doubt, the conviction cannot stand. *Kotteakos v. United States,* 90 L. Ed. 1557, 1566, 328 U.S. 750.

II.

The Facts of Counts Three, Six and Eight.

Count three alleges a fraudulent sale to Mr. and Mrs. Kryway accomplished by a letter placed in the mails in Orlando, Florida, on March 17, 1960. Mr. Kryway stated that after seeing an advertisement in the paper, he went to the CFC office and spoke to Defendant Hogue who explained to him the limitations on non-resident investors, gifts for investors, and asserted CFC had assets of $3,000,000 and was engaged in the real estate and subdivision business in Florida [R. 1917-1920]. Mr. Kryway received a note for $3,000 signed by Defendant Hogue in an envelope postmarked Or-

lando and dated March 17, 1960 [Govt. Ex. 88, R. 1922]. After his talk with Mrs. Hogue, he had intended to investigate the company further but didn't get around to it [R. 1919]. Petitioner helped Mr. Kryway carry a television set from the CFC office to his automobile but there was no evidence that Petitioner participated in or even was within ear range of the conversation between Mr. Kryway and Mrs. Hogue. Thus, there was no pertinent evidence connecting Petitioner to this count [R. 1932].

Count six alleges a fraudulent sale to Mr. Stemper accomplished by a letter placed in the mail in Orlando, Florida, on January 25, 1960. Mr. Stemper testified that he wrote CFC in January of 1960 and received a reply letter by mail signed by Defendant Gibbons dated January 25, 1960 [Govt. Ex. 89, R. 1944, 1951]. He had no intention of investing in CFC after receipt of the letter [R. 1944]. In August of 1960 he went to the CFC office in Orlando and met Defendant Schiff who told him that CFC had financed the Baptist Church, had real estate, financed cars and was inspected by the State auditors [R. 1847, 1949-1950]. Mr. Stemper testified that the envelope in which he received the letter [Govt. Ex. 89] was mailed in Orlando because the letterhead had an Orlando address [R. 2081]. There was no evidence connecting Petitioner in any way to this count.

Count eight alleges a fraudulent sale to Mrs. Virack accomplished by a letter placed in the mail in Orlando, Florida, on January 21, 1960. In January, 1960, Mrs. Virack went to the CFC Orlando office and spoke to Defendant Gibbons who told her that CFC dealt in real estate, automobiles and that her money was as safe as

in a bank [R. 1068, 1070]. She then invested $5,000.00 [Govt. Exs. 43 and 44, R. 1072]. Later she received a letter through the mail signed by Gibbons, dated January 21, 1960, concerning a gift of a camera [Govt. Ex. 46, R. 1078]. She did not retain the envelope in which she received Exhibit 46 and there was no evidence that it was mailed in Orlando [R. 1085-1086, 1088]. There was no evidence connecting Petitioner in any way to this count.

The proof adduced was insufficient to support a verdict of guilty on the theory of direct participation, the only basis upon which the evidence was submitted to the jury. As stated in *Nye and Nissen v. United States,* 93 L. Ed. 919, 926, 336 U.S. 613, "The fact that a particular case might conceivably be submitted to the jury, on either theory, [Pinkerton or aiding and abetting] is irrelevant. It is sufficient that the proof adduced and the basis on which it is submitted was sufficient to support the verdict." Petitioner was not indicted as an aider and abettor nor was his case submitted to the jury on that theory or on the *Pinkerton* doctrine. There is no evidence to show that he participated directly in the commission of the substantive offenses, the base of his conviction, or anything to establish that he was the direct actor in any of the substantive offenses on which his conviction rests. The result is that Petitioner has been held guilty of substantive crimes committed by others solely on evidence aimed at conspiracy. There is nothing in the record suggesting, let alone proving, that he conferred with or advised those who directly committed the offenses or even that he was aware of the nature of those offenses. There was, therefore, no evidence at all that he aided, abetted or took part in the substantive offenses. The conviction of Petitioner on counts three,

six and eight (the substantive offenses) is wholly unsupported.

Nor can the conviction on count ten (conspiracy) stand. A conspiracy charge may not be imposed upon a substantive charge where the agreement of two persons, framing the conspiracy, is necessary for the completion of the substantive crime, since there would be no ingredient in the conspiracy which is not also present in the substantive crime. In connection with each of the substantive offenses, the indictment alleges that the Defendants collectively employed a scheme to defraud. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. Inasmuch as each of the substantive offenses, by the allegations in the Indictment, became a conspiracy, the conspiracy count had no ingredient which was not present in the completed offenses. *Pinkerton v. United States,* 90 L. Ed. 1489, 1496, 328 U.S. 640, 647. Where it is impossible to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable offense, either at common law or under the federal statute. *Gebardi v. United States,* 77 L. Ed. 206, 211, 287 U.S. 112, 122, 53 S. Ct. 35.

Conclusion.

A Writ of Certiorari to the Court of Appeals to the Fifth Circuit should be issued, to the end that so much of the Court's Judgment as affirmed the Judgment of the District Court may be reviewed.

Respectfully submitted,

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